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No. 156

IN THE
**SUPREME COURT OF THE
UNITED STATES**
OCTOBER TERM, 1944

LONGHORN PORTLAND CEMENT COMPANY, *Petitioner*,
v.
COMMISSIONER OF INTERNAL REVENUE, *Respondent*

SAN ANTONIO PORTLAND CEMENT COMPANY, *Petitioner*,
v.
COMMISSIONER OF INTERNAL REVENUE, *Respondent*

**PETITION FOR A WRIT OF CERTIORARI
to the United States Circuit Court of
Appeals for the Fifth Circuit
AND SUPPORTING BRIEF**

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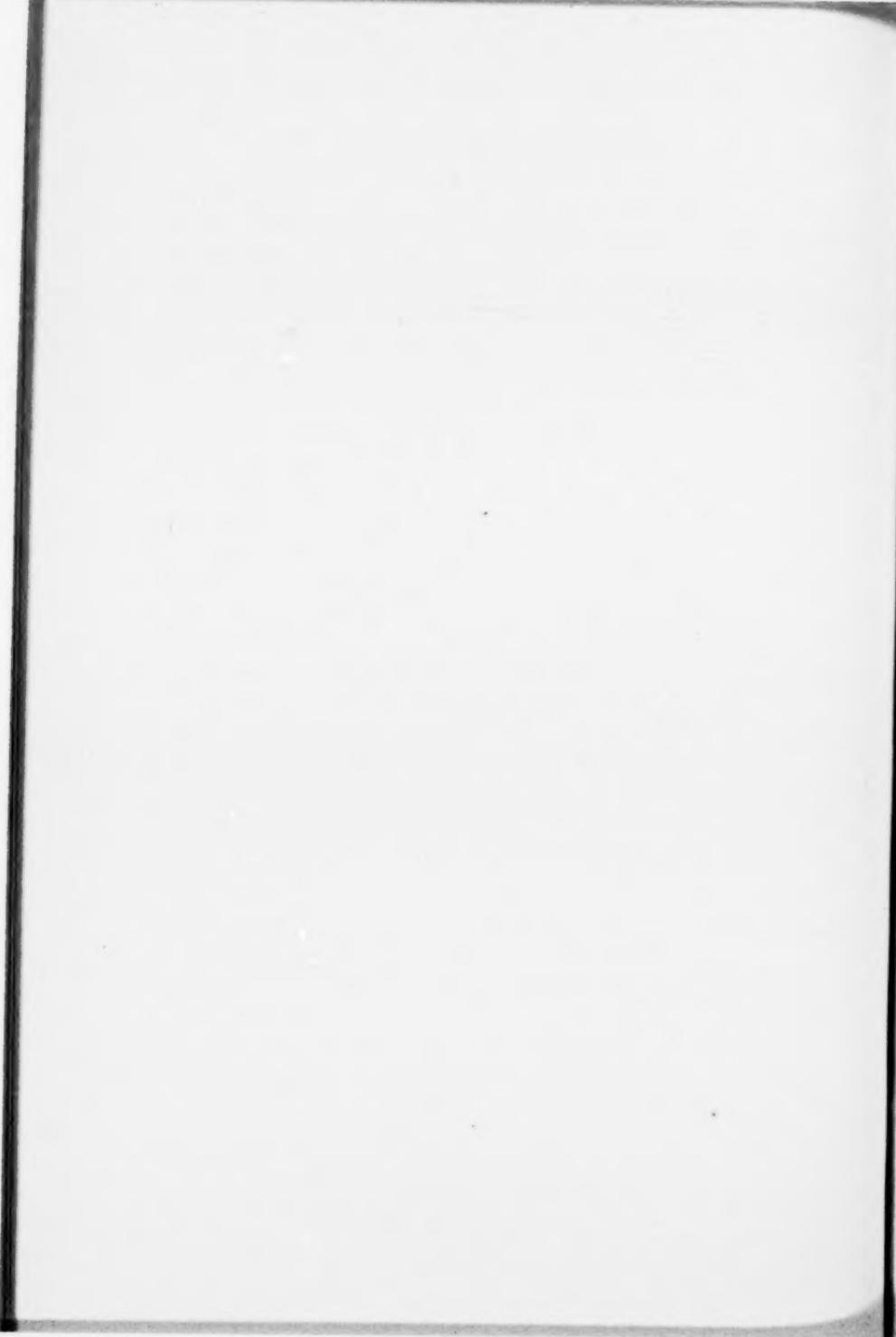
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PETITION FOR A WRIT OF CERTIORARI
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*To the Honorable the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

Petitioners, Longhorn Portland Cement Co. and San Antonio Portland Cement Co., pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in the above-entitled cause on March 27, 1945. The judgment of the

Circuit Court reversed decisions of The Tax Court of the United States which had held that certain expenditures were allowable deductions within the meaning of Section 23(a) (1) (A) of the INTERNAL REVENUE CODE.

Opinions Below

The opinion of The Tax Court of the United States (R. 38) was promulgated February 21, 1944, and reported in 3 T. C. 310. The opinion of the Circuit Court of Appeals (R. 104) is reported in 148 Fed. (2d) 276.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the JUDICIAL CODE, as amended, 43 Stat. 938 (28 U.S.C.A., Sec. 347). The judgment of the Circuit Court was entered on March 27, 1945 (R. 108).

Statutes Involved

The statute involved is Section 23(a) (1) (A) of the INTERNAL REVENUE CODE, which reads as follows:

Sec. 23. Deductions from Gross Income.

In computing net income there shall be allowed as deductions:

Sec. 23(a)

(a) Expenses.—

(1) Trade or Business Expenses.—

(A) In General.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including

a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

Question Presented

Where amounts are paid to the State of Texas in compromise of a disputed claim for penalties for alleged violations of State Laws, and where the facts show that the compromise was based upon a stipulation that the payment should not be construed as an admission of the alleged violations and where the true considerations for the compromise are shown, are the amounts so paid deductible as ordinary and necessary business expenses within the meaning of Section 23(a)(1)(A) of the INTERNAL REVENUE CODE? The Tax Court found as a *fact* that the amounts paid were not penalties and held them to be allowable deductions. The Circuit Court inferred that the amounts were penalties and therefore not allowable as deductions and reversed the decisions of The Tax Court.

Summary Statement

The following facts, stated in summary form, were found by The Tax Court:

The petitioners are Texas corporations engaged in the manufacture and sale of cement (R. 39). A suit was brought against the petitioners by the State of Texas, in which it was alleged the petitioners had violated the anti-trust laws of

Texas and that the petitioners were thereby subject to statutory penalties as provided by law (R. 39).

The petitioners vigorously denied any of the asserted violations and were advised by counsel that they had a good defense to the claims (R. 40). However, in 1939, under a stipulation which clearly provided that no admission of guilt or violation should be construed therefrom, the petitioners each paid to the State of Texas the sum of \$50,000 to dispose of the suit (R. 41-43). The petitioners were motivated solely by business reasons (described in full in the brief hereinafter), and not by any sense of guilt (R. 40).

In their Federal income tax returns for the taxable year 1939, the petitioners each deducted the amount so paid to the State of Texas as an ordinary and necessary business expense. The Commissioner of Internal Revenue disallowed this deduction in his notice of deficiency addressed to the petitioners for the year 1939 (R. 17). The Tax Court found that the payments were ordinary and necessary business expenses within the meaning of Section 23(a)(1)(A) of the INTERNAL REVENUE CODE, thereby sustaining the contentions of the petitioners (R. 45).

Decision of the Circuit Court

The Circuit Court of Appeals reversed the decisions of The Tax Court in this respect and held that the payments were not allowable deductions on the ground that they were payments made to extinguish a cause of action to impose a penalty and must therefore be regarded as penalty payments (R. 104).

Specification of Errors to Be Urged

The Circuit Court of Appeals erred:

- (1) In disregarding the rules on review established by this Court in **DOBSON v. COMMISSIONER** (1943), 320 U.S. 489, and in reversing The Tax Court's finding of fact that the payments made by the petitioners were not penalty payments and were allowable deductions.
- (2) In drawing inferences from the facts which have no support from the facts in treating a compromise settlement of a disputed claim as the equivalent of a penalty payment.
- (3) In determining that The Tax Court applied an erroneous principle of law when the principle of law determined by the Circuit Court can have no application to the facts found by The Tax Court.

Reasons for Granting the Writ

- (1) The decision by the Circuit Court of Appeals conflicts with the principles announced by this Court in **DOBSON v. COMMISSIONER**, 320 U.S. 489, and has so far departed from the accepted and usual course of judicial proceeding on review as to call for an exercise of this Court's power of supervision. (Supreme Court Rule 38-5(b).) Compare **BINGHAM v. COMMISSIONER**, — U.S. —, decided June 4, 1945.
- (2) The Circuit Court of Appeals has decided a question of importance to the administration of Federal law which has not been, but should be settled by this Court.
- (3) The decision by the Circuit Court of Appeals is in conflict with the weight of applicable authority pertaining to the regard to be accorded compromise settlements.

The reasons stated above will be discussed in the brief.

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